United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1218

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To be argued by
LAWRENCE S. GOLDMAN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

RICHARD WIENER,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee, Docket No. 75-1218

-against-

RICHARD WIENER,

Defendant-Appellant.

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT RICHARD WIENER.

PRELIMINARY STATEMENT

This is an appeal by defendant-appellant Richard Wiener from a judgment of conviction entered in the United States District Court for the Southern District of New York after a trial by jury (Hon. Edmund L. Palmieri, presiding) on June 3, 1975.

Defendant Wiener was convicted of one count of conspiracy to distribute and possess with intent to distribute hashish [21 U.S.C. 841(a)(1), 841(b)(I)(B)], one count of possession with intent to distribute hashish [21 U.S.C. 841(a)(1), 841(b)(1)(B)], and one count of simple possession of marijuana [21 U.S.C. 844(a)].

Wiener was sentenced to a term of imprisonment of two years and a $2,500 fine on each of the two hashish charges, and a term of imprisonment of six months on the marijuana charge, the prison terms to be served concurrently, and to a special parole term of two years. Execution of sentence has been stayed pending appeal.

STATEMENT OF FACTS

THE SUPPRESSION HEARING

The Government's Case

Michael O'Connor, a Drug Enforcement Administration agent, testified that on October 30, 1974, he was advised by his supervisor that later that day a DEA undercover agent, Moran, would be negotiating to purchase approximately forty pounds of hashish in the vicinity of 80th Street and Second Avenue in New York City (M6)*. At 6 p.m. that day, at 80th Street and Second Avenue, O'Connor observed Larry Silverman and Wiener's co-defendant Steven Silverman (M7). Shortly thereafter, the undercover agent Moran drove up to that area and parked his car (M7). O'Connor then saw Steve Silverman enter Moran's car and appear to converse with Moran for approximately five minutes (M8).

Steve Silverman then got out of the vehicle, and trailed by O'Connor and two other agents, Powers and Greenan, walked to and entered an apartment building at 215 East 80th Street (M9). Standing in the lobby of the building, the witness saw Steve Silverman and defendant Wiener exit the building, at

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* References with the prefix "M" are to the minutes of the hearing on defendant's motion to suppress evidence.

which time Silverman gave two keys to Wiener, who returned them to Silverman and stated to Silverman, "I will go watch" (M10). The witness then observed Silverman enter a Chevrolet Nova, drive it away and shortly thereafter park it on 80th Street and Second Avenue (M11) next to Moran's car (M10-11). At that time defendant Wiener was near the corner of 81st Street and Second Avenue (M11).

After Silverman parked near Moran's car, Silverman opened the trunk of his car and Moran then opened the trunk of his car (M12). At this time, O'Connor, with gun drawn, placed defendant Wiener under arrest, handcuffed him, searched him and advised him of his Miranda rights (M12, M38-9). O'Connor then brought defendant to the corner of 80th Street and Second Avenue, where Steve and Larry Silverman had been placed under arrest (M41). At this time, there were other DEA agents present in addition to O'Connor, each with his gun drawn (M38, M41). A huge crowd had gathered (M41). O'Connor and another agent took custody of Larry Silverman and drove him away, leaving Steve Silverman, the defendant and the other agents at 80th Street and Second Avenue (M42).

Michael A. Powers, a DEA agent, testified on direct examination that on the day in question, after agent O'Connor arrested Wiener, O'Connor brought Wiener to the corner of 80th

Street and Second Avenue (M54). The agents then handcuffed Wiener to Stephen Silverman and placed the two defendants in the rear of agent Greenan's car; Greenan and Powers got into the front seat (M55-6). The agents then proceeded to drive to DEA headquarters (M55). As they were driving, Powers advised Wiener of his Miranda rights (M55). At this time Wiener stated that he wanted to go to his apartment because he "wasn't sure whether he locked the security lock and he thought his wife might be back there and he would like to tell her that he was arrested" (M55).

The agents then drove to Wiener's apartment building and, there, the agents brought the two defendants, handcuffed together, to Wiener's apartment (M56). Wiener knocked on the door and his wife answered, at which time everyone entered the apartment (M56). Powers then told her that they had arrested her husband and that the agents had come "to insure the safety of his apartment" (M56). After seating Wiener and Silverman on a couch, handcuffed together, Powers asked Wiener whether he had any narcotics in the apartment (M57). Wiener replied, "If you find any, you can have them" (M57). Powers then asked, "Does that mean you are giving us your consent to search the apartment?" (M57) Wiener stated, "If you find any, you can have them" (M57). Powers proceeded to search through the apartment, finding in a closet a sack which contained an

inhalation mask, pipes, cigarette rolling paper, marijuana and a gun (M58-9).

On cross-examination, Powers acknowledged that when Wiener, while riding in the car, had asked to return to the apartment, the agents did not say anything to Wiener about searching the apartment when they got there (M75). He further testified that Wiener was not advised that he had a right to reject the agents' request to search the apartment (M77), nor did the agents obtain from Wiener a written consent to search the apartment (M77). Powers also acknowledged that the agents' written memorandum as to the events in question contained no mention of the agents asking Wiener if he consented to a search or of Wiener stating "If you find any narcotics, you can have them" (M78).

James Greenan, a DEA agent, testified that on the evening in question, after Wiener and Stephen Silverman were arrested, they were handcuffed together and placed in the rear of Greenan's car at 80th Street and Second Avenue (M89). Greenan, with agent Powers seated next to him, proceeded to drive the car to DEA headquarters (M90, M102). As they approached 79th Street and Fifth Avenue, Wiener stated that he wanted to return to his apartment to set the security lock (M90). Greenan then drove to Wiener's apartment building, at

which point the agents and Wiener proceeded to Wiener's apartment (M90). There, Wiener knocked on the door and his wife answered it (M90-1).

In the apartment, Powers asked Wiener whether there were narcotics in the apartment, to which Wiener replied that if the agents found narcotics, they could have them (M91). Powers then inquired "Does that mean you are giving us a consent to search your apartment?" to which Wiener answered, "If you find any narcotics, you can have them" (M91). Powers then requested Wiener's wife to accompany him on a search of the apartment (M92). During the course of Powers' ensuing search, he found a satchel (M92).

At no time was Wiener advised that he had a right to reject the agents' request to search the apartment (M107).

Greenan acknowledged that although the Drug Enforcement Agency utilizes prepared forms for obtaining consent from individuals to conduct a search, none of the agents participating in the arrests here in question had a consent form with them, nor was Wiener asked to put in writing his consent to search the apartment (M105-7).

The Defense

Richard Wiener, the defendant, owner of two restaurants and bars on the upper East Side of Manhattan, testified

hat he had not previously been convicted of a crime (M131). On the day in question, at approximately 6:30 P.M., in the vicinity of 81st Street and Second Avenue, he was arrested by a DEA agent who held a gun to his head (M132). He was then taken to the corner of 80th Street and Second Avenue where four or five DEA agents were present (M133). After being searched there, he was then handcuffed with his hands behind him and placed in the rear of a car; next to him was co-defendant Steve Silverman and in the front seat were two agents (M133-4).

As the car proceeded east, one of the agents said to the other, "Let's go back and search Wiener's apartment," to which the other replied "Fine" (M134). At no time did Wiener request to return to the apartment (M134). He stated that his apartment does not have a security lock and that there is a doorman at his apartment building (M135). Wiener testified that he was pushed and shoved by one of the agents in the car and that he was a "nervous wreck" (M135, M159).

The agents then drove to Wiener's apartment building, where, at his request that his handcuffs not be in public view as he walked through the lobby, he was handcuffed arm-in-arm to Silverman and a coat was placed over the handcuffs (A136). At the entrance to his apartment, one of the agents told Wiener to give him the keys to the door (M137). Wiener complied with this command (A137). The two agents, Wiener and Silverman

then entered the apartment where Wiener's wife, Joyce, greeted them (A137). Wiener was "really nervous" at this time (A137).

In the apartment the agents announced to Wiener's wife, "We are going to search your apartment and if there's any drugs in this apartment, you are going to be placed under arrest, too" (A138). At no time did the agents advise defendant that he had a right to refuse them permission to search the apartment and at no time did Wiener consent to a search of the apartment (M138, M164-5). After Wiener was placed on a couch, still handcuffed to Silverman, one of the agents commanded Wiener's wife to accompany him as he searched the apartment (M165). The agent, accompanied by Wiener's wife, then went into one of the bedrooms (M139). Moments later, she came running out, very upset, and stated that the agent had no right to talk to her "like this" (M139-40). The agents then proceeded to search the apartment for approximately one-quarter to one-half hour (M140, M170). At no time was Wiener advised that he had a right to remain silent, that any statement he made could be used against him, that he had a right to an attorney or that an attorney could be appointed for him (M172-3).

Joyce Wiener, defendant's wife, testified that she was employed by the National Football League as its player

appearance coordinator (M177). On the evening in question she arrived home at approximately 6:30 P.M. (M177). Moments later the door to the apartment was opened and her husband, Steve Silverman, and two other persons entered (M178). The latter two identified themselves as DEA agents, announced that they were going to search the apartment and that if they found anything incriminating there, they were going to place her under arrest (M178). In fear at this time, she was not advised by the agents that she or her husband had the right to prohibit the agents from searching the apartment (M178). At no time did the agents request consent from the Wieners to search the apartment (M178).

As her husband sat on a couch handcuffed to Steve Silverman, Agent Powers proceeded to search the apartment, accompanied, at his request, by Mrs. Wiener (M179). In one of the bedrooms, Powers told Mrs. Wiener that he had the apartment under surveillance for the last several days and that he had not seen his wife all that time (M180-1). He then asked her, "Why don't you sleep with me?" and the agent then told her, "You know your husband would walk away from all this." (M181). At this point, Mrs. Wiener, very upset, walked out of the room, complained to the other agent, Greenan, who was in the living room, and began to cry (M181, 192). Powers continued the search, which lasted about forty-five minutes (M195).

Powers found in one of the bedrooms a shoe bag, which the agents took with them when they left the apartment (M193).

The Government's Rebuttal

James Greenan, recalled as to the events on the evening in question, testified that in the car with Wiener and Silverman prior to returning to Wiener's apartment, neither agent said anything about searching Wiener's apartment. He further testified that after they arrived at Wiener's apartment, Powers commenced a search in one of the bedrooms of the apartment accompanied by Mrs. Wiener (M237). Powers and Mrs. Wiener came out of that room after a minute or two and she did not say anything to Greenan (M237). Mrs. Wiener appeared to be calm during the search of the apartment (M243).

Michael A. Powers, recalled, denied abusing, touching or pushing Wiener at any time on the evening in question (A247). He acknowledged that in the agents' car, after Wiener requested to return to his apartment to secure the lock, Powers agreed to do so with the purpose of searching the apartment and that he did not disclose this purpose to Wiener (M249, M262-3).

He further acknowledged that in the apartment he might have told Mrs. Wiener that if the agents found any drugs

there, she would be arrested since that was "a standard type of statement" he made (M250). And, he conceded that he might have told her that the agents had the apartment under surveillance for two days and that if made, this was a false statement because the agents did not previously have the Wieners' apartment under surveillance (M251, M266). Powers acknowledged that Mrs. Wiener appeared "extremely upset" and "close to crying" during the search of the apartment (M252). Additionally, he stated that he may have told her upon entering the apartment that her husband was in "big" trouble (M266-7).

He denied telling Mrs. Wiener that he had not seen his wife for several days and denied telling her that if she slept with him, her husband would not be prosecuted (M251).

THE TRIAL

The Government's Case

Stephen Moran, a DEA agent, testified that on October 30, 1974 he was on an undercover assignment to purchase forty pounds of hashish at $650 a pound. The purchase was to take place at East 80th Street and Second Avenue in New York

City, but he did not recall who set the location (23-24)*. Moran parked his car at East 80th Street and Second Avenue, and there met Stephen Silverman and Larry Silverman. Stephen Silverman said that the stuff was nearby and suggested that they continue negotiations in Moran's car (25-26).

In the car, Stephen Silverman said that he wanted the deal to proceed in two parts: Moran would get the first part and pay $13,000 and then get the second load and pay the remaining $13,000. Moran said he wanted to complete the deal in a single transaction, and, at Silverman's request, showed Silverman $30,000. Silverman then said he was going to get the car and bring the hashish, and left Moran's car and walked west on 80th Street (26-27).

Five to ten minutes later, Stephen Silverman drove up and parked a Chevrolet Nova parallel to Moran's car. He opened the Nova trunk, which contained two shopping bags, and at Moran's request, opened a plastic bag inside the shopping bag and showed the agent the hashish. Thereupon, Moran signaled the surveilling agents and they arrested both him and Silverman (28-29). Inside the rear seat of the car, Moran observed two additional shopping bags containing hashish (30).

On cross-examination, Moran admitted that he had

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* References without a letter are to the minutes of the actual trial.

destroyed the handwritten notes which he made as preparation for a formal case report, which was dated November 6, 1974 (39). He said that on the two days prior to the sale, he had been in contact with an informant, who said he had arranged the drug transaction with Larry Silverman (40). When he arrived at 80th Street and Second Avenue on October 30, both Larry Silverman and Stephen Silverman were on the scene, but he did not see the defendant Wiener until after his arrest (41).

Michael Powers, a DEA group supervisor, testified that he arrived at Second Avenue and 80th Street at 6 P.M. on October 30, 1974 with Agent Greenan. There he observed Stephen Silverman and Larry Silverman waiting and walking around the block (53-54). He saw Agent Moran arrive and meet with Stephen Silverman in Moran's car, then saw Silverman leave Moran's car, walk east on 80th Street and enter the apartment building at 215 East 80th Street (55-56).

Powers and Greenan then entered the building, spoke to the doorman and walked down the hallway. As he and Greenan were walking down the hallway, Stephen Silverman and defendant Wiener approached them. Powers overheard Wiener ask Silverman, "Where is the guy?", and Silverman respond, "He is down on the corner of 80th and Second". After Wiener and Silverman passed him, Powers turned around and watched them leave the building. He saw Agent O'Connor standing next to them. He

observed Silverman give Wiener two keys, which Wiener put on a key ring and returned to Silverman (57-58).

Wiener and Silverman went in opposite directions, Wiener walking east on 80th Street. Powers followed Silverman until he entered a Chevrolet Nova parked on 81st Street (59). Powers then went to 81st Street and observed Wiener on the corner of 81st Street and Second Avenue. He soon saw Silverman double-park the Nova at 81st Street and Second Avenue and walk across Second Avenue (60). He then saw the Nova double-parked at 80th Street and Second Avenue, observed Silverman and Moran confer there and then saw Silverman open the trunk. When Moran gave a pre-arranged signal, Powers arrested Stephen Silverman (60-61).

Following the arrest, Powers went to Wiener's apartment, where in a canvas bag he found "approximately one pound of marijuana," a loaded pistol, and various smoking implements - pipes, cigarette rolling paper and an inhalator mask (62-66). In response to Powers' question, Wiener denied any knowledge of the gun or marijuana (73). Powers asked Wiener if he had a permit and Wiener did not respond (75).

On cross-examination, Powers denied making any written notes of the occurrence and was not aware if any other agents made handwritten notes (77). It is "our usual policy" not to make such notes but to do the formal report "right after the occurrence," he said (78). In this case, however, the report

was drawn up November 6 (81-82).

Prior to October 30 Powers had conversations with the informant, who told him that the initial contact in this case was a telephone call from Larry Silverman and that he, the informant, had several discussions with Larry Silverman (79-80). Larry Silverman was arrested at the scene on October 30, but was not formally charged. He gave the DEA a statement on October 31 (80-81).

Powers testified that he was "within a couple of feet" of Wiener and Stephen Silverman when he overheard the conversation between them (98). As they approached him, Powers slowed down and Greenan walked ahead. Powers then turned around and followed Wiener and Silverman toward the doorway. When they were just outside the door, Wiener and Silverman stopped. At that time Powers was from ten to twelve feet from the defendants and O'Connor was between the agent and the defendants (98-101).

Powers admitted that the amount of marijuana found was approximately one-half of a pound, not one pound as he stated on direct examination (104-105). He also said that no hashish had been found in Wiener's apartment (107).

Michael O'Connor, a DEA agent, conducted a surveillance on the night of October 30, 1974. He observed

Agent Moran and the informant meet and confer with Larry Silverman and Stephen Silverman (111-113). He then saw Stephen Silverman and Moran go into Moran's car and talk for about five minutes (114). Silverman then left the car and entered the apartment building at 215 East 80th Street. O'Connor followed him into the building and remained in the vestibule with the doorman. There he saw Stephen Silverman and Wiener leave the building. At the entrance he observed Silverman hand Wiener two keys. Wiener returned them to Silverman on a key ring and said "I will go watch." (115-116).

O'Connor saw Stephen Silverman enter the Nova. Then the agent walked to 81st Street and Second Avenue, where he saw Silverman park the Nova, cross the street and speak to Wiener, then get back into the car and drive south (117-119). O'Connor testified that he saw Silverman park the Nova parallel to Moran's car, leave the car and meet Moran at the trunk of the Nova. Upon Moran's signal, O'Connor arrested Wiener, who, he testified, had been leaning on a car hood watching the two vehicles (119-120).

Upon cross-examination O'Connor said he had made no notes concerning this case (127). He said that Larry Silverman was arrested at the scene but was released later that night (129-131).

Upon entering the apartment building, O'Connor testified, he saw Agents Powers and Greenan go through the

lobby. He entered the lobby but remained in the vestibule talking with the doorman. When he first saw Silverman and Wiener, they were from fifteen to eighteen feet away. At that time he did not see Powers or Greenan (132-134). Silverman and Wiener stopped outside the vestibule only two feet away from him for about a minute, during which period he observed the passage of the keys and heard part of the conversation. At the time he was speaking to the doorman, O'Connor said, he was looking out toward the street. After the statement he overheard, he observed Powers several feet away in the lobby (135-137). Later, O'Connor arrested Wiener. He searched the defendant but found no weapons (138-139).

Stephen Silverman testified that he had pleaded guilty to one of the two counts in the indictment that named him and was awaiting sentence. He had a written agreement with the Government which required him to cooperate with the DEA and testify truthfully at trial. In return, the Government would dismiss one of the counts in the indictment and would not prosecute him for other crimes, except perjury, and would make known his cooperation to the sentencing judge (147-150).

On January 8, 1975, two months after his arrest, Silverman admitted himself into a New Jersey hospital. Two days later, at the recommendation of the hospital, he was

transferred to Fair Oaks Psychiatric Hospital. He was released from the hospital on January 28, 1975, and at the time of trial was not under psychiatric care (150-152).

Silverman testified that he met Wiener when he sold merchandise to restaurants owned by the defendant (154). In late September 1974 Wiener told him he had access to 800 pounds of hashish but did not want to deal in lots of less than fourteen pounds. Two days later, in Wiener's apartment, Silverman sampled the hashish. The drug was pressed into wheels about ten inches in diameter and weighing about two pounds. Despite his stated desire to deal in fourteen pound lots or greater, Wiener supplied hashish to Silverman for one sale involving one pound and one involving nine pounds (155-163).

On October 28 or 29, "a friend - an acquaintance of mine," as Stephen Silverman called him (164), who had participated in the nine pound transaction, said he had a buyer. Wiener said forty pounds were available at $550 per pound, and Silverman was going to sell it at $650 per pound. The transaction was to occur in two parts - the sale of twenty pounds with payment for that amount, then the sale of and payment for the remaining amount. Silverman told the "buyers" to meet him on October 30 at 6 P.M. at 80th Street and Second Avenue (164-166).

On that day, Silverman testified, he drove from New

Jersey to Second Avenue with Larry Silverman, whom he described simply as "the person I drove into New York with" (167), called Wiener and then went to Wiener's apartment. Wiener packaged the hashish into four garbage bags, placed two bags in the trunk of a car parked on the street, and two bags in the back seat. He gave Silverman one key, told him to deliver the hashish and bring half the money to Wiener, then to get the key for the hashish in the back seat (169-171). Silverman then left to meet Larry Silverman.

Stephen Silverman then met Larry Silverman. Shortly thereafter, the two purchasers appeared. Stephen Silverman went into a car with one of them, who showed him the money. The purchaser said he wanted to complete the transaction in one trip and Silverman then left to ask Wiener if that was acceptable (170-172).

Wiener agreed to do the deal in a single transaction. Silverman described the buyer and his car, and Wiener said he would "watch to see if everything went down smoothly." (173) Wiener gave him a second key. They then left Wiener's apartment and as they were leaving the building, Silverman asked which key was for the car. Wiener then took the keys and put them together (173-174). Both left the building, Wiener going west on 81st Street and Silverman going east. Silverman entered the car and drove to meet the buyer but miscalculated.

On the street, he saw Wiener, who said he was a block north (175). Silverman then drove to meet the buyer, made the deal, and was arrested (176).

Silverman said he had no prior convictions but had a pending New Jersey state case involving just under a pound of marijuana (193). Under his agreement with the prosecutor, the Government was to do nothing with respect to that case (194).

On cross-examination, Silverman admitted that he had been committed to Fair Oaks Psychiatric Hospital as a mentally ill person by court order (195). He did not know whether he was hallucinating at the time or whether two doctors had certified that he was mentally ill. After he signed into the first hospital, Silverman said, his condition worsened and he was put under sedation, then transferred to Fair Oaks (196-199). Before he went into the hospital, he had used marijuana and barbituates regularly, but no longer took drugs. He was "confused" while at the hospitals, but was not now (201-202, 206).

Silverman admitted knowing Larry Silverman for five years or more. He was not a good friend or a relative, just "an acquaintance" (208). He said he was "hopeful" of not going to jail on either the federal or the New Jersey case because of his cooperation (211-212). He admitted that although his geographical bail limitations were restricted to New York and

New Jersey, the Assistant United States Attorney gave him permission to travel to Jamaica (225). He said he had spoken to agents in this case about twenty times, but they had not pressured him (226).

On the day of the arrest, Silverman said, he drove to New York with Larry Silverman, who was arrested with him (229-230). Although he had known Silverman for five years, he did not know where he was living and had not seen him since the day after the arrest. Although Larry Silverman had been released the previous night, he went to court on October 31, the day Stephen Silverman was arraigned and spoke to him. Thereafter, Stephen Silverman, on November 1, gave the agents a statement implicating Wiener (231-233). Silverman admitted that throughout his direct testimony, he referred to Larry Silverman as the "buyer" and not by name (242-243).

On redirect examination, Silverman said that, as he told the DEA on November 1, Wiener, not Larry Silverman, was the source of the hashish (248). He learned of the hashish from Wiener, then was called by Larry Silverman and asked if he could get him some hashish (255).

Anthony Fonseca, a DEA chemist, identified the substance in the garbage bags as a "preparation of marijuana, cannabis sativa L of the hashish type". He identified the

substance found in Wiener's apartment as less than one-half of one pound of marijuana (186).

Daniel Weinert, an employee of Olin's Rent-a-Car, identified a business record showing that the 1974 Chevrolet Nova had been rented by Richard Wiener at 4:38 P.M. on October 30, 1974 (283-284).

The Defense

Ronald Goldstein, part-owner of two restaurants with Richard Wiener, testified that on occasion he or Wiener would at the close of business take home proceeds of from $800 to $1,000. He was aware that Wiener kept a pistol at his home (292-293).

James Greenan, a DEA agent, testified that he participated in the arrest of Wiener on October 30, 1974 and after the arrest went to Wiener's apartment with him. At the apartment, in the presence of his wife, Wiener said, "If you find any narcotics, you can have them" (307-308).

Greenan said that when he walked past Silverman and Wiener in the lobby earlier that day, he overheard talking but could not make out the conversation (311). He said that he had destroyed the handwritten notes he made in this case (312-313).

Julio Arroyo, a doorman at 215 East 80th Street, testified that on October 30 three DEA agents entered the building. Two went upstairs and one remained with him (352-353). At that time Arroyo was facing the entrance. As Wiener and Silverman approached the doorway through the lobby, the agent he was with started a conversation with Arroyo and turned his back to the defendants. Four to five seconds later, Arroyo saw Silverman walking alone toward Third Avenue. Only then did the agent turn around toward the entrance (355-360). Arroyo did not see any passage of keys or hear any conversation (361).

The Government Rebuttal

Michael Powers, recalled by the Government as a rebuttal witness, testified that from the rear of the lobby he observed Wiener hand the keys to Silverman (395-396).

ARGUMENT

Introduction

After a one-week trial, the jury returned a verdict of guilty against the defendant on one count of conspiracy to distribute and possess with intent to distribute hashish, one count of possession with intent to distribute hashish, and one count of simple possession of marijuana.

The Government's case against Wiener relied heavily on the testimony of Stephen Silverman, an alleged accomplice who only two and one-half months prior to trial had been committed by court order to a psychiatric hospital as a mentally ill person. The defense assailed Silverman's credibility on the basis of his mental stability, his admitted criminal background, and his favorable treatment by the Government in exchange for his testimony. The defense further argued that Silverman was seeking to protect his friend Larry Silverman at the expense of the defendant Wiener. Buttressing this argument was the witness's obvious attempt on direct examination to avoid mentioning Larry Silverman and to minimize his role in the transaction, and his admission that he gave the DEA no statement implicating Wiener until after he had conferred with Larry Silverman on the day he was arraigned.

The Government also presented two agents, O'Connor and Powers, who testified that they overheard certain statements by Wiener and made an observation of the transfer of car keys. Their credibility as to these matters was sharply challenged by the defense and was contradicted by Julio Arroyo, the doorman, called as a defense witness.

The Government also showed that approximately two hours before the transaction Wiener had rented in his own name the car in which the drugs were found. This evidence was undisputed, but whether Wiener was aware that the car was to be used in a drug transaction was sharply in issue.

In sum, although viewed in the light most favorable to the Government, the evidence is sufficient to justify a conviction, the Government's case was far from strong. Viewed in this background, the errors discussed below denied Wiener a fair trial and mandate a reversal of his conviction.

POINT I

THE DEFENDANT DID NOT VOLUNTARILY AND UNEQUIVOCALLY CONSENT TO THE SEARCH OF HIS APARTMENT.

The Court, after a sharply-contested hearing on a motion to suppress, ruled that the defendant had consented to the search of his apartment, which revealed a pistol, a quantity of marijuana, and some smoking paraphernalia.

At the hearing, agent O'Connor testified that he arrested the defendant at gunpoint. Agents Powers and Greenan testified that after Wiener was arrested, he was handcuffed to Silverman and put in Greenan's car. About fifteen minutes later, after being advised of his Miranda rights, as he was being driven to DEA headquarters, according to Powers and Greenan, Wiener asked the officers if he could return to his apartment to set the security lock and tell his wife he had been arrested. Powers agreed to return, thinking it would be a "good chance to go back and get a look at the apartment" (M249).

At the apartment, the agents were let in by the defendant's wife. Then, according to Powers' testimony, Powers asked Wiener, who was then handcuffed to Silverman, if he had any narcotics in the apartment. Wiener replied, "If you find any, you can have them." Powers then asked, "Does that mean you are giving us your consent to search the apartment?" Again, Wiener said, "If you find any, you can have them."

The agents then conducted a cursory search of the apartment, finding in a closet a satchel containing a quantity of marijuana, a pistol and smoking paraphernalia.

The agents acknowledged that Wiener was never advised that he had a right to refuse to consent to a search of the apartment. They further admitted that they did not ask him to sign the commonly-used DEA consent form or otherwise put in writing his consent. They further acknowledged that their written report of the case made no mention of their asking the defendant if he consented to the search or of his stating that if they found narcotics, they could have them.

Powers also conceded that he might have told Mrs. Wiener in Wiener's presence that Wiener was in "big trouble" and that if he found any drugs in the apartment he would arrest her also since that was a statement he commonly made under such circumstances. He also admitted that he might have lied to her by saying he had the apartment under surveillance for two days.

At the hearing, the Government did not call Stephen Silverman, its key witness at the trial.

The defense testimony sharply contradicted that of the agents. Wiener testified that while he was in the agents' car, they decided by themselves to return and search his apartment, and at no time did he request that they return. In

fact, he did not even have a security lock and lived in a secure building protected by a doorman. Upon arriving at his building, at the agents' command, he gave them the keys to his apartment and they opened it. Once inside the apartment, the agents announced to his wife that they were going to search the apartment and would arrest her if they found any drugs. At no time prior to the search was he advised that he had a right to refuse the agents permission to search his apartment, nor was he advised of his right to remain silent or to secure an attorney.

Mrs. Wiener testified that the agents entered her apartment with Stephen Silverman and her husband, announced that they were going to search the apartment and that they would arrest her if they found anything incriminating. Neither she nor her husband were ever asked if they consented to a search of the apartment, nor were they ever advised that they had a right to refuse the agents permission to search.

The court, accepting the prosecution's testimony, found that the defendant consented to the search of his apartment and ruled the seizure of the gun, marijuana and smoking paraphernalia valid.

A. The Court's Determination of Credibility Was Clearly Erroneous.

The defendant realizes, of course, that the

credibility of witnesses in a suppression hearing is a question for the judge who heard them testify, and his findings should not be lightly overturned. United States v. Miley, 513 F.2d 1191 (2 Cir. 1975); United States v. Faruolo, 506 F.2d 490, 493 (2 Cir. 1974). However, in this case, for several reasons, the testimony of the agents defies belief.*

First, their testimony that Wiener asked them to return to his apartment to set the security lock is clearly contradicted by the uncontested fact that the apartment had no security lock and was protected by a doorman. Second, the failure of the agents to mention in their detailed case report that they asked Wiener if he consented to the search and that he said that if they found narcotics, they could have them strongly indicates that no such statements were made. Third, the Government failed to demonstrate any writing, including the standard DEA consent form, to document their claim of consent. Fourth, the Government did not call Silverman, their principal witness at trial, to corroborate the Government's testimony. Lastly, the Government's claim that Wiener invited them to search his apartment, when he undoubtedly was aware that narcotics and a weapon would be

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* See People v. Rivera, - A.D.2d - , 369 N.Y.S.2d 2 (N.Y., 1st Dept. 1975) and People v. Pepitone, - A.D.2d - , 368 N.Y.S.2d 181 (N.Y., 1st Dept., 1975) for two recent cases where courts found incredible the testimony of police officers in drug cases.

found, flies in the face of logic.

The statement that the agents claimed Wiener made is tantamount to a denial that there were drugs in his apartment coupled with an invitation to search. As Judge Weinfeld said, in suppressing items found in a purportedly consensual search in United States v. Gregory, 204 F.Supp. 884, 885 (S.D.N.Y. 1962):

> "The alleged consent here presented - a defendant at once denying that narcotics are in his room and at the same time agreeing to a search which obviously must yield narcotics - is not in accord with common experience."

For all of these reasons, the court's factual determination was clearly erroneous and must be reversed.

B. The Defendant's Purported Consent Was Involuntary.

Even accepting the agents' testimony in full, the court erred in ruling that the defendant's consent was voluntary.

In justifying a warrantless search on the grounds that the defendant consented to it, the Government must show from the "totality of the circumstances" that the consent was freely and voluntarily given. Schneckeloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Such a waiver of a fundamental

right cannot be presumed and must not lightly be inferred. United States v. Mapp, 476 F.2d 67, 77 (2 Cir. 1973). And, in a case where the defendant is in custody, the Government's burden is "particularly heavy", United States v. Mapp, at 78; Gorman v. United States, 380 F.2d 158, 163 (1 Cir. 1973).

In this case, Wiener, a young man with no criminal record, had been arrested at gunpoint, and placed in handcuffs approximately one-half hour prior to the search of his apartment. While the mere fact of arrest, of course, does not preclude a finding of voluntariness, United States v. Miley, supra, at 1201, United States v. Candella, 469 F.2d 173, 175 (2 Cir., 1972), the fact of arrest carries "its own aura of coercion," United States v. Mapp, supra, and is "of critical importance" United States v. Bolin, 514 F.2d 554, 561 (7th Cir., 1975). See also Schneckeloth v. Bustamonte, supra, at 240, f.n. 29.

The undisputed testimony in this case is that neither the defendant nor his wife were advised that they had a right to refuse the agents permission to search their apartment. In Schneckeloth a divided Supreme Court held that the absence of such a warning did not necessarily preclude a finding of voluntary consent by one not in custody, but left open the question of whether it would preclude such a finding for a person who had been arrested. Schneckeloth v. Bustamonte,

supra, at 240. While this Court has ruled that the absence of such advice is but one factor to be considered; see e.g. United States v. Mapp, supra, and compare Pittler v. State, - Ind. - , 323 N.E. 2d 634 (Ind. 1975), it is an important consideration. See United States v. Watson, 504 F.2d 849 (9th Cir., 1974), cert. granted, 95 S.Ct. 1117 (1975).

In this connection, it is significant that the agents failed to follow common DEA practice by having Wiener sign a consent form. That form would have advised him of his right to refuse the agents permission to search. See United States v. Miley, supra, at 1204. While Greenan testified that none of the agents had these forms with them, that testimony is certainly suspect in view of the fact that the agents expected to make an arrest that evening. In any case, even crediting this dubious explanation, the agents' failure to follow the agency's general procedure is a significant factor in the "totality of circumstances." See e.g. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Hefner, 420 F.2d 809 (4th Cir. 1970).

In Leahey, in suppressing inculpatory records, the court held that the Internal Revenue Service "had a duty to conform to its procedure, that citizens had a right to rely on conformance, and that the Courts must enforce both the right

and the duty." Even though it appeared that the defendant there had not been prejudiced, the court in Leahey suppressed the offered evidence. "The crucial question" said the court "is whether we must exclude this evidence so that agencies will be compelled to adhere to the standards of behavior that they have formally and purposely adopted in the light of the requirements of the Constitution." 434 F.2d at 10.

In Hefner the court ordered a new trial because of the improper introduction of inculpatory statements made by the defendant to Internal Revenue Service agents. In that case the special agents inadvertently failed to advise the defendant that he should retain counsel, as required by agency instructions. Although the statements were apparently not obtained in violation of Miranda v. Arizona, 348 U.S. 436 (1966), since the defendant was not in custody at the time he made them, the court ruled that they should not have been admitted since had the defendant been advised by the agents as required, he might not have made them. Such a ruling, the court said, would have the salutory effects of encouraging agents to follow IRS procedures and of insuring uniformity of application.

In the present case, of course, had Wiener been advised of his right to refuse the agents permission to search, as the consent form would apprise him, he doubtless would have

refused. The agents should not be allowed to gain the benefit of their own purposeful or negligent failure to follow their own agency's procedures.

Another significant element to be considered here is Powers' threat to arrest Mrs. Wiener if drugs were found in the apartment. See United States v. Bolin, supra. While such an arrest for possession of narcotics found in a jointly-owned apartment might arguably be justified, the agents did not in fact arrest Mrs. Wiener even though there was no evidence to indicate that the items seized did not belong to her either individually or jointly. The clear purpose of Powers' statement was to coerce Wiener into cooperating with him. Even if Powers' statement was not so calculated, its obvious effect toward the defendant is to induce him to cooperate with agents who have the power to arrest and imprison his wife.

Lastly, the agents admittedly used a deceit to gain entry to the apartment. Powers conceded that when Wiener asked to return to his apartment, he agreed since he viewed it as an opportunity to search the apartment. Such a ruse used to enter the apartment is in itself a constitutional violation. Bumper v. North Carolina, supra, People v. Jefferson, 43 A.D. 2d 112 (N.Y., 1st Dept. 1973).

For all of these reasons -- the fact of arrest, the failure to apprise the defendant of his right to refuse the

agents permission to search, the failure to have him sign a standard DEA consent form, the threat to arrest his wife, and the ruse used by the agents - the defendant's purported consent to search his apartment was not freely and voluntarily given.

C. The Defendant's Purported Consent Was Equivocal at Most.

In order to justify a warrantless search on the basis of consent, the Government must show that the consent was not only voluntary but also was "specific and unequivocal". United States v. Smith, 308 F.2d 657, 633 (2 Cir. 1962) cert. den. 372 U.S. 906 (1963); United States v. Marotta, 326 F. Supp. 377, 380 (S.D.N.Y. 1971), aff'd 456 F. 2d 1336 (2 Cir. 1972).

In this case, according to the agents' testimony, Wiener stated to the agents, in response to their question whether there were narcotics in the apartment, that if they found any they could keep them. When the agents asked if this statement meant that they had his consent to search, he repeated it. By this question it is clear that even the agent did not view Wiener's statement as the unequivocal and specific consent required to allow them to search the apartment.

Under similar circumstances the courts have refused to find consent based on ambiguous and equivocal statements of the type made here. In United States v. Gregory, supra, the defendant, upon his arrest, was asked if he had more "stuff" in his room. He responded in the negative, but when the agent said he would like to look, replied "You can look if you like". Such a circumstance, said Judge Weinfeld "is not the consent which constitutes an unequivocal, free and intelligent waiver of a fundamental right". United States v. Gregory, supra, at 885.

In Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649, 650 (1951), the defendant, after his arrest, was asked if he had certain items in his home and responded, "I have nothing to hide, you can go there and see for yourself." The Court, in ruling that this statement was not an unequivocal and specific consent, said:

> " ... Conceivably, that is the calm statement of an innocent man; conceivably, again, it is but the false bravado of the small-time criminal. But, however it be characterized, it hardly establishes willing agreement that the officers search the household without first procuring a warrant ..." 190 F.2d at 651.

In Channel v. United States, 285 F.2d 217, 220-21 (9th Cir. 1960), the defendant, after his arrest, said "I have no stuff in my apartment and you are welcome to go search the whole place."

Considering that case in view of Judd, the Court said:

> "In neither case was there any specific statement by the defendant that the search could be made without a warrant. If this element may be supplied by inference it could be said that since consent was not needed to search with a warrant, Channel must have intended to permit a search without a warrant. But an equally permissible inference, as the court points out in Judd, is that the words were not designed to give consent at all but only evidenced false bravado. In view of this choice of inferences it cannot be said that the consent to search without a warrant was specific and unequivocal." 285 F.2d at 220 (underlining supplied).

Cf. United States v. Page, 302 F.2d 81 (9th Cir. 1962).

Wiener's statement that the agents could keep any drugs they found is even more equivocal than the statements made in those cases. Wiener's words, "If you find any, you can have them", are not even in a literal sense an invitation to search, as are the statements in Gregory, Judd and Channel. They are clearly a "smart-alecky" response showing his "false bravado".

In those cases in which the courts have found consent to a warrantless search, there has generally been either an exculpatory strategy of the defendant, see e.g. United States v. Curiale, 414 F.2d 744 (2 Cir. 1969) cert. den. 396 U.S. 959 (1970) and United States v. Dornblut, 261 F.2d 949 (2 Cir. 1958) cert. den. 360 U.S. 912 (1959); or an amiability between the police

and the defendant, see e.g. United States v. Smith, supra. In Curiale, the defendant expected to turn away suspicion by giving the agents his wholehearted cooperation since the contraband was well hidden and he expected the agents not to find it. Here, the marijuana and gun were found in a brief, cursory search in a satchel in a closet and there is no reason to believe the defendant was unaware of them. In Smith the defendant had admitted his guilt and cooperated with the police. Here the defendant made no admissions at all. See also United States v. Ciovacco, 384 F. Supp. 1385 (D.Mass 1974).

Wiener's ambiguous and equivocal statement cannot be considered the unequivocal and specific consent required to justify a warrantless search. The items found - the pistol, the marijuana, and the smoking paraphernalia - should have been suppressed.

POINT II

THE ADMISSION OF THE GUN FOUND IN WIENER'S APARTMENT WAS REVERSIBLE ERROR.

Over strenuous defense objection, the Government introduced into evidence a loaded gun found in the defendant's apartment. The introduction of this weapon was irrelevant, prejudicial and inflammatory. Its admission was reversible error.

The gun was totally unrelated to the crimes charged against the defendant. There was no testimony in this case in any way relating the gun to the sale or possession of narcotics. Indeed, Stephen Silverman, the Government's key witness, who testified about prior drug dealings with Wiener and about discussions with Wiener concerning precautions to prevent being "ripped off" in the sale in issue, made no mention of a gun.

Most importantly, although according to Silverman Wiener left his apartment to observe the transaction on the street in order to see if it "went down smoothly" (173), Wiener did not have the gun on his person at that time. Thus, not only is there a total absence of proof that Wiener intended to use the gun in furtherance of the sale of drugs, but the very facts of this case negate that argument.

In introducing the gun the apparent purpose of the Government was to portray Wiener as a dangerous man with criminal propensities and a "fundamentally immoral" person. United States v. Beno, 324 F.2d 582, 589 (2d Cir. 1963), cert. den. 379 U.S. 880 (1964). The admission of the gun was thus highly prejudicial and made it impossible for the jury to limit its consideration to the crime with which Wiener was charged. United States v. Tomaiolo, 249 F.2d 683, 690 (2 Cir. 1957).

In a similar case, Moody v. United States, 376 F.2d 525 (9 Cir. 1967), the Court reversed a conviction because of the improper admission of a gun and related testimony. There the defendant was charged with unlawfully importing heroin from Mexico. The defendant and the accomplice Aguirre drove from Los Angeles to Tijuana, where they picked up the drugs. After leaving the defendant in Tijuana, Aguirre drove the car to the United States, where he was to rejoin the defendant. At the border, the car was searched by customs officials. Heroin was discovered in various parts of the car and a loaded revolver and cartridges were found in the glove compartment. Over the defendant's objection, Aguirre testified that he had seen the gun in the glove compartment prior to the trip to Mexico, that he knew it was loaded, and knew that it was in the car during the trip to Mexicc, and that it belonged to the defendant. No further testimony related to the gun.

In finding the admission of the gun improper, the Court said, at 532:

> "The presence of a loaded revolver could only be regarded by the jury as indicating that the appellant was a bad man engaged in a criminal enterprise, who might shoot anybody who attempted to frustrate the illegal importation of heroin, although in the circumstances of this case the presence of the loaded gun was not relevant to any matter which the jury was called upon to decide."

The prosecution's real purpose in this case, as revealed in her summation, is identical to the purpose assailed by the Court in Moody. The prosecutor sought to show that Wiener knew how and was ready to use the gun. Displaying the pistol, she said:

> "From what we know of the defendant from Steve Silverman's testimony, he knows how to protect himself in a deal, a business deal, the two trips. More importantly, he knows how to protect himself, with things like this ...." (448).

In Moody, the Court found that the gun was not relevant to a prosecution for the crime of smuggling drugs. If a gun is not related to such a crime, which necessarily involves active confrontation with and deception of law enforcement officials, a fortiorari, it is not relevant to a prosecution for the sale of drugs, which is intentionally not carried on at government checkpoints.

Possession of a gun is generally relevant to prove a crime of violence, United States v. Ravich, 421 F.2d 1196 (2 Cir. 1970), cert. den. 400 U.S. 834 (1970); United States

v. Baker, 419 F.2d 83 (2 Cir. 1969), cert. den. 397 U.S. 971 and 397 U.S. 976; United States v. Johnson, 401 F.2d 746 (2 Cir. 1968); United States v. Walters, 477 F.2d 386 (9 Cir. 1973) cert. den. 414 U.S. 1007. However, when the crime charged is, as here, a non-violent one, barring special circumstances, a gun is not admissible. Thomas v. United States, 376 F.2d 564 (5 Cir. 1967); Giordana v. United States, 185 F.2d 524 (6 Cir. 1950); Brubaker v. United States, 183 F.2d 894 (6 Cir. 1950). Moreover, even if the crime is a violent one, a gun cannot be admitted if the crime was not committed with the use of weapons. United States v. Laker, 427 F.2d 189 (6 Cir. 1970); United States v. Reid, 410 F.2d 1223 (7 Cir. 1969).

In United States v. Campanile, - F.2d - (2 Cir., April 24, 1975 slip. op., p. 3109), this Court reluctantly allowed the admission of a gun in a case involving a nonviolent bank burglary at night. In that case the defendant had, by his own admission, gone from New Jersey to Vermont to "line up robberies." The Court said:

> "Following his arrest, Campanile admitted that he took the gun with him and, while it was not used, having it along would appear to be a form of criminal insurance for the success of the venture. Thus it was probative of intent. But we think this evidence was on the borderline of admissibility in view of its tendency to create unfair prejudice." (slip. op. 3115).

Unlike the situation here, in Campanile the gun was purposely taken in the venture as "insurance" for its success.

Here, to the contrary, when Wiener left his apartment, he left the gun behind and clearly did not intend to use it. Compare United States v. Cannon, 472 F.2d 144 (9th Cir., 1973), United States v. Pentado, 463 F.2d 355 (5th Cir., 1972), cert. den. 409 U.S. 1079 and 410 U.S. 909. If, therefore, Campanile represents the outer limits of admissibility, the introduction of the gun here was error.

Therefore, should this Court rule that the gun here is admissible, then in every case involving the possession for sale of contraband - whether it be drugs, stolen furs, stolen securities or whatever - a gun found in the defendant's apartment, however unconnected to the crime charged, would be admissible.

The Court, in admitting the gun into evidence, stated broadly that guns are "well-known accoutrements and implements of trade to drug traders" (45). And in United States v. Bennett, 409 F.2d 888 (2 Cir. 1969), reh. den. 415 F.2d 1113, cert. den. 396 U.S. 852, reh. den. 396 U.S. 949, the Court allowed the seizure of a gun in a search for "instrumentalities" used in an international heroin conspiracy.* However, although guns arguably may be commonly associated with

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* Bennett, however, did not concern the admissibility of the gun at trial, but only the propriety of the search and seizure.

the "hard drug," e.g., heroin, trade, in this case, the drug involved was hashish, a cannabis derivative like marijuana, commonly sold by a different type of wrongdoer. Such a broad rule, as the trial court enunciated here, is inapplicable.

In testimony before the House of Representatives Judiciary Committee Subcommittee on Crime on July 25, 1975, New York City Mayor Abraham D. Beame said that in the City of New York, according to experts' estimates, there are now more than one million handguns, only 29,000 of which are registered. Press Release 267-75, Office of the Mayor of the City of New York. If that many New Yorkers have handguns, the statistical correlation between possession of a weapon and drug dealing obviously is quite low. And although guns may be commonly possessed by drug dealers, the fact that a citizen possesses a gun does not have any probative weight in determining whether he is a drug dealer.

More importantly, even if guns generally can be inferred to be "instrumentalities" in the sale of soft drugs, in this case the Government's own evidence contradicted that inference. Not only was there no evidence that Wiener intended to use the gun to further the drug sale, there was clear and uncontradicted proof to the contrary.

While the Court has "wide discretion" in this area, United States v. Ravitch, supra, it had an obligation to balance

the interests in this case in determining the admissibility of the gun. On the one hand, it should have considered the probative value of the gun. On the other hand, it should have considered the great prejudice to the defendant by its admission. In fact, the Court never applied a balancing test but allowed the introduction of the gun on the broad and simplistic theory that guns were generally related to drug traffic. Whatever validity that inference has generally, the evidence clearly belies that contention in this case. The probative value of the admission of the gun here was nil. The prejudice was quite obviously great. The gun should not have been allowed in evidence.

The admission of the gun cannot be considered "harmless error." First, in this era of great concern with violent crime, admission of a loaded pistol is so inflammatory and prejudicial that rarely can it be found harmless. Second, the case was a close one. The Government's case relied heavily on Stephen Silverman, an accomplice who only two and one-half months prior to trial had been confined to a psychiatric hospital, and on some sharply-contested statements and observations the agents allegedly heard and saw. Nor does it matter that the defense gave a reason for Wiener's possession of the gun. The defendant should not have been required to offer an explanation. "Whether the explanation be false or true, he should not have been driven by the people to the necessity of offering it." People v.

Zackowitz, 254 N.Y. 192, 199 (1930)(J. Cardozo).

The error was serious enough to have prevented the jury from a fair and deliberate consideration of the relevant facts. A new trial is required.

POINT III

THE COURT'S CHARGE WAS UNFAIR AND PREJUDICIAL.

The Court's instructions to the jury distorted the defendant's arguments, omitted his major theory, presented a one-sided and argumentative recitation of the facts, and improperly commented on the credibility of witnesses. Any of these errors mandate reversal.

By exaggeration the Court so distorted the contentions of the defense that it became almost impossible for the jury to acquit. The Court gave the jury the impression that it must find that the Government's entire case was fabricated for it to return a verdict of acquittal.

In its most complete reference to the theory of the defense, the Court said:

> "... that they [the agents] have him [Silverman] in the palms of their hands and they have squeezed him as they wished and that Powers is a fraud and O'Connor a liar.
>
> "Ladies and gentlemen, those are very serious charges and they are not to be taken lightly. If you can come to the conclusion that Wiener has been framed by Silverman with the assistance of these agents and that these agents have lied and used Silverman as an instrument of their fraudulent and perjurious conduct in this case, then we have engaged in a monstrous charade and you should have no hesitancy in acquitting the defendant.
>
> "On the third count, the count having to do with the marijuana found allegedly in Wiener's

> apartment. If you disbelieve all of Silverman's testimony in this case, you will have to acquit the defendant Wiener on that count because the only evidence that would permit you to conclude that Wiener had possession of that marijuana or that he had possession of it with intent to sell it is Silverman's evidence because nobody in this case knows what happened inside of that apartment, so far as this evidence is concerned, except Silverman."* (499-500) (Emphasis added).

In fact, the defense never posed such drastic "all-or-nothing" alternatives. The defense did not argue that the Government "framed" Wiener, that the trial was a "monstrous charade", or that Silverman or the agents lied totally. The defendant did argue that the agents added "details" to their stories to corroborate the inherently suspect testimony of the accomplice and recently-released mental patient Silverman.

Particularly, with respect to the clear conflict between the testimony of Julio Arroyo, the doorman, and that of the agents, defense counsel did argue that the agents "were lying in regard to those events" (417) and that Powers was lying "through his teeth" (419) in his testimony on rebuttal. This indictment of the agents, however harsh, is a far cry from the charge of a"frame".

Moreover, the defense never disputed Silverman's testimony as far as it involved his own participation in the

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* In fact, Silverman offered no testimony at all relative to the approximately eight ounces of marijuana found in Wiener's apartment, or to any transaction with Wiener concerning marijuana.

drug transaction. The defense did concede that the agents had reason for "suspicion" of Richard Wiener (414, 417). But it argued that the testimony of Silverman - an accomplice, a recently-released mental patient, a man trying to protect his friend Larry Silverman - was "not that solid, substantial evidence" (406) upon which a conviction should be based, and that the corroborative details supplied by the agents were untrue.

By overstating the contentions of the defense and emphasizing the seriousness of these contentions, the Court suggested to the jury that the defense had some undefined burden to sustain them. Additionally, such an instruction no doubt created in the mind of the jurors images of potential recriminations against the agents, should they acquit. Moreover, the Court's gratuitious remark that if the jury believed that the trial was a "monstrous charade", it should have "no hesitancy" in acquitting, implied conversely that if it did not believe that the trial was such a "charade", it should have "hesitancy" in acquitting. Lastly, the Court's use of the term "we" implied that the defense charge was directed at the Court as well as the defendant. By this statement, the Court improperly put its own integrity on the line.

In reading the instructions of the Court, "it would be difficult to tell whether one were reading the instructions

of a court or the argument of a prosecutor." Weare v. United States, 1 F.2d 617, 619 (8 Cir. 1924). Indeed, the Court's charge here echoed, albeit in even harsher terms, the version of the defense given by the prosecutor:

> "You are not only going to have to find that Stephen Silverman didn't tell the truth to you, in fact totally fabricated his entire testimony, you are going to have to find that every single agent that took the stand fabricated this testimony" (427).*

While such disparagement by exaggeration by the prosecution in summation may be proper, it has no place in the charge by the Court.

In United States v. Dichiarinte, 385 F.2d 333 (7 Cir. 1967) cert. den. 390 U.S. 945 (1968) the defense to a sale of narcotics was mistaken identity. In that case defense witnesses contradicted government agents' testimony as to the identity of the seller. In its charge to the jury, the trial court said:

> "... [T]his case bristles with issues of veracity. It bristles with such issues as to who is telling the truth.
>
> "In instances too numerous to specify, and I don't intend to do it, the testimony of witnesses called by the government has been contradicted by testimony of the defendants. The government witnesses make certain statements as to what occurred on this particular occasion, and the defendants have produced evidence on their part as to where they were on the

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* Not only did the defense not contest Silverman's testimony as it related to his own involvement in the crime, as opposed to Wiener's alleged participation, the defense did not quarrel with the testimony of Agent Moran or of Agent Greenan, who was called as a defense witness.

night in question. It is your function and yours alone to decide where the truth lies. (Id. at 339-340).

The Court, in reversing the conviction, found this instruction prejudicial error.

> "In the remark just quoted, the court seems to have told the jury that the issue was whether the agents or the defense witnesses were lying. This has been the issue posed by the prosecutor in his rebuttal, just concluded: " ... somewhere there is perjury." Defense counsel, however, had avoided charging the agents with dishonesty.
>
> "Defense counsel ... argued, in substance, that the agents were mistaken in later selecting Dichiarinte and Mastro as the men they had seen.
>
> "Government counsel, in rebuttal, intimated that the defense was charging that the agents were framing defendants. He argued that the witnesses on one side or the other must be lying, and the agents would have no reason to lie.
>
> " ... [W]e think in ordinary parlance, the court's remark would be interpreted by the jury as agreeing with the prosecutor, that the issue was whether the agents or the defense witnesses were lying ....
>
> "We think it at least a plausible theory that the agents were mistaken, though honest, and that the jury could have acquitted without branding the agents as liars. The defendants had the right to have the jury consider that theory. The court, however, seemingly adopted the prosecutor's proposition that either the agents or the defense witnesses must have lied, without balancing such comment by reminding the jury that they were to consider the defense theory of mistake." (Id. at 340).

See also United States v. Wallace, 291 F. 972, 973-974 (6 Cir. 1923). cf. United States v. Lotsoff, 394 F.2d 619 (2 Cir., 1968).

Similarly, here, by elevating the defense's charges against the Government's witness to a higher level of venality then charged by the defense, the Court prevented the jury from acquitting without branding the agents with the charge of a "frame". The defendant had a right for the jury to consider the case based on his theory that Silverman lied about Wiener's involvement and that the agents lied in adding corroborative details. The jury might properly have accepted substantial portions of the testimony of Silverman, Powers, and O'Connor and yet reached a verdict of acquittal. The Court's "all-or-nothing" approach prevented it from doing so.

Furthermore, in its instructions to the jury, the court omitted and paid minimal attention to the evidence and theories offered by the defense while emphasizing aspects of the prosecution's case.

The major contention of the defense was that Stephen Silverman falsely implicated the defendant Wiener in order to protect the real source of the hashish, his friend Larry Silverman. The basis for this argument was Stephen Silverman's admitted relationship with Larry Silverman, Larry Silverman's presence at the scene, Stephen Silverman's obvious attempts at the trial to avoid mentioning Larry Silverman by name and to minimize his role in the transaction, and Stephen Silverman's failure to implicate Wiener until after he had conferred with Larry Silverman the day he was arraigned (409-413). The

prosecution saw the necessity of rebutting this defense (429-430), but the Court never mentioned it.

The Court, in responding to the defendant's objection to this serious omission, responded:

> "You say that I have got to repeat your defense. That is a theory. You have figured out a motive on the basis of a man I have never seen, who has never been called as a witness and you say that he is trying to blame it on Wiener in order to protect Larry Silverman. I can't do that. It is not my function to do that (514)
>
> * * *
>
> "I am not supposed to adopt your thesis and to spin out your solutions for what you consider to be the real truth in the case. You are casting me in a role which I am not supposed to play (515)."

It was, however, the Court's role to charge the jury on this major defense contention. As this Court has said:

> "A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak that evidence may be." United States v. O'Connor, 237 F.2d 466, 474, f.n.8 (2 Cir. 1956).

See also Tatum v. United States, 190 F.2d 612 (D.C.1951).

There was clearly some foundation in the evidence for the defense theory. The defendant had a right to have it presented to the jury. The Court's omission was serious error, compounded by the Court's distortion of the defense's other contentions.

The omission of this major contention from the charge was symptomatic of the Court's generally one-sided recital of

the evidence.

For instance, explaining to the jury that prior acts are relevant only to intent, the Court explained, in exceptional detail:

> "You remember that Stephen Silverman was allowed to testify over objection that he had talked to Wiener shortly before the transactions which are the subject of this indictment about the availability of a large amount of hashish and that Wiener had told him that he wouldn't sell less than 15 pounds and there was an exhibition of a wheel of hashish which he described as ten inches in diameter, two inches thick and weighing two pounds and that it looked like one of the wheels that was offered in evidence in this case; that Silverman had been in the apartment when there were deliveries of hashish to the apartment and on one occasion he made a pick-up where he delivered $800 to Wiener and that Wiener weighed and wrapped the hashish and gave it to him and then he gave it to a customer who was waiting downstairs and that on one occasion he smoked the hashish as a sample in order to try it.
>
> "Well, that evidence, none of it was relevant to the charge of this case ...." (476-477).

The flavor of this recital is reminiscent of the anecdote about the elderly spinster discussing a sex-filled best seller: "That book disgusted me. But I was careful to read every word just to see how disgusting it was."

In stark contrast to this lengthy discussion of largely irrelevant material is the Court's entire recital of the defense case:

> "The defendant called Ronald Goldstein, the co-owner of his restaurant business, and Julio Arroyo, the doorman at 215 East 80th Street where the defendant lives and Agent Greenan was also called by the defendant." (492).

These witnesses were not mute. Arroyo's testimony, in particular, was significant in that it clearly contradicted the key testimony of Agents O'Connor and Powers. Yet, the Court never even mentioned the conflict.

Moreover, the Court emphasized undisputed bits of testimony and gave them undue importance to the jury to consider. Twice the Court recounted the testimony about Silverman licking his thumbs in Moran's car counting money (475, 491) a fact of no importance to the jury's determination of Wiener's guilt. Yet, the Court highlighted this testimony as an important factor for the jury to consider.

> "You will recall the evidence with respect to Stephen Silverman in the car of O'Connor [sic] where he was observed to have counted money and according to his own testimony he was wetting his thumb while he was counting $26,000 of one hundred dollar bills and you also had some conversation, according to his testimony and that of Agent O'Connor [sic] who was acting in an undercover capacity, about making one delivery for one payment or two deliveries for two payments and so forth. All of this happened outside the sight and hearing of Wiener, but if you find that there was a conspiratorial agreement between Wiener and Silverman and that what Silverman was doing was in furtherance of this conspiratorial agreement, then <u>you can see how that takes you a long way down the road of reaching a conclusion with respect to the charge contained in the first count</u>." (475) (Emphasis added).

The crucial evidence in this case, however, concerned Silverman's alleged involvement with Wiener. The defense never disputed that Silverman had sold hashish to Moran. It contended

simply that Wiener was not involved in the sale. Thus, the testimony about Silverman's transaction with Moran in the car did not take the jury "a long way down the road of reaching a conclusion". By advising the jury that this undisputed testimony was crucial, the Court, in effect, directed a verdict of guilty.

"A federal judge need not summarize the evidence at all. But if he undertakes to do so, the summary must be fair and adequate. The authorities are agreed that it must not be one-sided." Williams v. United States, 93 F.2d 685, 692 (9th Cir. 1937).

Here, the Court's recital was clearly one-sided. It not only emphasized the Government's theory and neglected the defense, but it suggested to the jury that it improperly draw conclusions from undisputed and unimportant facts.

Lastly, in its comments on Silverman's credibility, the Court invaded the jury's function.

The defense sharply attacked the credibility of the witness, based on his mental background:

> "Perhaps the most obvious thing and perhaps you don't even have to say anything more about accepting the word of Stephen Silverman as a basis for a most serious felony conviction is the fact that this man got out of a mental institution three months ago. What does that mean, three months ago? This man who they are asking you to rely on is a person, who couldn't brush his teeth, get dressed in the morning, walk outside on the street and mingle among you and me, let alone come into a courtroom and asking him to be stamped or take him

as the stamp which will suffice for a conviction of my client ....

"I submit that the testimony of Mr. Silverman, this man who was committed to a mental institution on court order with certification of two doctors just 90 days ago is not that solid, substantial evidence upon which you can say the prosecution has erased doubt in my mind." (476).

The Court parried this thrust:

"... I don't know how you are going to come out with respect to his testimony and, as I say, I do not wish to make any suggestion but I do say this: that regardless of how he comes out, Silverman is an extremely intelligent person. He considered every question that was put to him carefully and he articulated his responses with consummate care and I respectfully suggest that regardless of what else he may be he is a very intelligent person." (503).

This comment was unnecessary and improper. As Judge Weinstein has written:

"The court properly exercises its responsibility to guide the jurors in their search for the truth if it confines its remarks on credibility to those areas where the practical experience of the jurors may be an inaccurate yardstick to measure the veracity of a witness." 1 Weinstein and Berger, Evidence, 107-53.

No such aid in judging Silverman's demeanor was needed by the jury. This superfluous statement interfered with its exclusive right to judge the credibility of witnesses.

In United States v. Dunmore, 446 F.2d 1214, (8th Cir. 1971) cert. den. 404 U.S. 1041 (1971), the Court, in reversing a conviction, found error in a mirror image of the charge in this case.

There, the lower court said, in discussing the testimony of an accomplice:

> "Now, Carruthers is a crook. He is an admitted robber. He's 16 years old, and other things. But it's - you can use your own judgment in determining the testimony. He didn't seem to have anything to hold back. He told his story straight out, answered the questions that were asked him without hesitation, without pulling any punches, or anything of the kind." (Id. at 1219).

The Court of Appeals in reversing a conviction based almost totally on Carruthers' credibility, said that this comment "interfered with the jury's exclusive right to determine the credibility of witnesses and came dangerously close to directing the verdict against Johnson," 446 F.2d at 1219. The error was prejudicial, said the Court, particularly when the instruction flew in the face of the rule that an accomplice's testimony must be received cautiously. See also United States v. Persico, 349 F.2d 6 (2 Cir. 1965), Parker v. United States, 2 F.2d 710 (6 Cir. 1924).

The distortion of the defense argument, the omission of a major theory, the tainted recital of testimony, and the buttressing of the testimony of Silverman denied the defendant a fair trial. General statements as to the jury's liberty to reach its own verdict do not erase the imprint left by the charge. Quercia v. United States, 289 U.S. 466, 470 (1933); O'Shaughnessy v. United States, 17 F.2d 225 (5th Cir. 1927).

In Quercia Chief Justice Hughes spoke of the importance

of the trial judge. 289 U.S. at 470:

> "In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguard against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'."

The "impact of the error on the jury", United States v. Barry, - F.2d - (2 Cir.), decided June 18, 1975, slip. op. 4117, 4127, in this case was great. The accumulated errors, as well as each of them individually, denied the defendant a fair trial.

CONCLUSION

For all of the above reasons, it is respectfully submitted that the conviction of defendant Wiener should be reversed and a new trial ordered.

Respectfully submitted,

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August 7, 1975

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, - *against* - RICHARD WIENER, Defendant-Appellant	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF New York ss.:

I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 8th *day of* August *1975 at* ~~NX~~ 1 St. Andrews Place, N.Y., N.Y.

deponent served the annexed Brief *upon*
Paul J. Curran

the ~~NXXX~~ Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 8th
day of August *19* 75

Victor Ortega
VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977